101ST CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
101-231

FLAG PROTECTION ACT OF 1989

SEPTEMBER 7, 1989.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. BROOKS, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL, SUPPLEMENTAL, AND DISSENTING VIEWS

[To accompany H.R. 2978]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2978) to amend section 700 of title 18, United States Code, to protect the physical integrity of the flag, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Flag Protection Act of 1989".

SEC. 2. CRIMINAL PENALTIES WITH RESPECT TO THE PHYSICAL INTEGRITY OF THE UNITED STATES FLAG.

(a) IN GENERAL.—Subsection (a) of section 700 of title 18, United States Code, is amended to read as follows:

"(a)(1) Whoever knowingly mutilates, defaces, burns, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.

"(2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.".

(b) DEFINITION.—Section 700(b) of title 18, United States Code, is amended to read as follows:

"(b) As used in this section, the term 'flag of the United States' means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.".

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SEC. 3. EXPEDITED REVIEW OF CONSTITUTIONAL ISSUES.

Section 700 of title 18, United States Code, is amended by adding at the end the following:

"(d)(1) If the question of the constitutionality of this section, under the first article of amendment to the Constitution of the United States, is properly presented in any case before a United States district court, that court shall, if the Supreme Court of the United States has not previously ruled on that question, immediately certify that question to the Supreme Court.

"(2) The Supreme Court shall, if it has not previously ruled on that question, accept jurisdiction over the certified question and advance on the docket and expedite to the greatest extent possible the disposition of that question. The Supreme Court may, with respect to such question, give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

"(3) The Clerk of the Supreme Court shall promptly notify the Clerk of the House of Representatives and the Secretary of the Senate of the receipt of such certification, and each House of Congress shall have the right to intervene in the case for the purpose of defending the constitutionality of this section.".

EXPLANATION OF AMENDMENT

The Committee amendment clarifies the definition of "flag" in the bill as introduced. Because the current federal statute's definition of "flag" includes pictures and representations, it is so broad that it covers many things most people would not think of as a flag. Under the current definition, for example, a disposable paper cup or napkin with stars and stripes printed on it is itself a flag. The bill as introduced attempted to correct the problem of overbreadth by deleting the portion of the current definition that included pictures and representations. However, the Committee believes that the definition requires further clarification. Thus, the Committee amendment makes clear its intent that a flag does not include pictures of flags on magazine covers or products with flags printed on them. The amendment further narrows the definition by limiting it to those things that are commonly displayed as a flag, excluding, for example, a cake in the shape of a flag.

PURPOSE OF THE BILL AS AMENDED

The purpose of H.R. 2978, as amended, is to protect the physical integrity of American flags against burning, mutilation, defacing or trampling upon. The bill responds to the Supreme Court decision in *Texas* v. *Johnson* by amending the current Federal flag statute to make it content-neutral: that is, the amended statute focuses exclusively on the conduct of the actor, irrespective of any expressive message he or she might be intending to convey. The bill serves the national interest in protecting the physical integrity of all American flags in all circumstances. This interest is "unrelated to the suppression of free expression." *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968).

HISTORY

The Supreme Court issued its decision in *Texas* v. *Johnson* on June 21, 1989. In the ensuing weeks, 42 resolutions proposing constitutional amendments, 5 bills proposing statutory provisions, and 4 resolutions concerning the Supreme Court decision were introduced in the House and referred to the Subcommittee on Civil and Constitutional Rights. The Subcommittee held five hearings on the

question of whether and how to respond to the Supreme Court decision.

The Committee met to consider H.R. 2978 on July 26 and 27, 1989 and on July 27 voted to report favorably the bill, as amended, by a vote of 28 ayes and 6 nays.

BACKGROUND

TEXAS V. JOHNSON

During the 1984 Republican National Convention in Dallas, Texas, respondent Johnson participated in a demonstration protesting the policies of the Reagan Administration. At the end of the demonstration, in front of Dallas City Hall, Johnson unfurled a flag given to him by another protestor, doused it with kerosene, and set it on fire. While the flag burned, the protestors chanted, "America, the red, white, and blue, we spit on you." Johnson was arrested and charged with desecration of a venerated object in violation of Texas Penal Code Ann. § 42.09(a)(3) (1989).[1]

After a trial, Johnson was convicted and sentenced to one year in prison, and fined $2,000. The Texas Court of Criminal Appeals reversed the conviction, 755 S.W.2d 92 (1988), holding that the State, consistent with the First Amendment, could not punish Johnson for burning the flag in these circumstances.

The United States Supreme Court affirmed. Justice Brennan delivered the opinion of the Court in which Justices Marshall, Blackmun, Scalia and Kennedy joined. Chief Justice Rehnquist filed a dissenting opinion, which was joined by Justices White and O'Conner. Justice Stevens filed a separate dissent.

The Court began by outlining the analytical framework for a case where First Amendment protection is sought for conduct as opposed to speech. *Texas* v. *Johnson,* slip op. at 4–5. First, the Court must determine if the conduct in question is expressive conduct, thus allowing the defendant to invoke First Amendment protection. Id. at 5, citing *Spence* v. *Washington,* 418 U.S. 405, 409–411 (1974). If expressive conduct is involved, the Court must then decide whether the State's regulation is related to the suppression of free expression. The answer to this question will determine the level of scrutiny the Court will use in judging the appropriateness of the State regulation. If the State's regulation is not related to the suppression of free expression, then the less stringent standard of scrutiny announced in *United States* v. *O'Brien, supra,* will be used. *Johnson, supra,* at 5. Under this standard, the State need only show that the statute furthers an important governmental in-

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[1] Texas Penal Code Ann. § 42.09 (1989) provides:

§ 42.09 Desecration of a Venerated Object

(a) A person commits an offense if he intentionally or knowingly desecrates:
(1) a public monument;
(2) a place of worship or burial; or
(3) a state or national flag.

(b) For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

(c) An offense under this section is a Class A misdemeanor.

terest, and that the restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest.

On the other hand, if the State's regulation is related to suppression of free expression, then the analysis is outside of the *O'Brien* test, and the Court must use a "more demanding" standard of review. Id. at 5. Here the government would have to show a compelling interest, and that its regulation is narrowly tailored as the least restrictive alternative.

To determine whether particular conduct contains enough expressive elements to trigger First Amendment protection, the Court must decide whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." Id. at 6, citing *Spence, supra,* at 410–411. The Court in *Johnson* examined the context in which the conduct occurred, and found that Johnson's conduct met the test. The majority noted that the flag itself "pregnant with expressive content", but it stated that not all actions taken with respect to the flag are expressive. Id. at 7. The majority noted that the State of Texas had conceded for purposes of its argument that Johnson's conduct was expressive conduct. Id. at 8. Furthermore, the burning of the flag was a culmination of a political demonstration. According to the Court, Johnson's conduct was intentionally expressive, and its overtly political nature was overwhelmingly apparent. Under these circumstances, the Court found the burning of the flag was conduct "sufficiently imbued with elements of communication" to implicate the First Amendment. Id. at 8.

The Court then looked at the Texas statute to see if it was aimed at suppressing expression, or if the governmental interest to be protected by the statute was unrelated to the suppression of free expression. The answer to this question would decide the standard of scrutiny that would be applied.

Texas set forth two state interests to justify its conviction: (1) preventing breaches of the peace; and (2) preserving the flag as a symbol of nationhood and national unity. Id. at 9. The Court held that the first interest was not implicated on the facts of the case, and rejected the second interest because it was related to the suppression of expression. Id at 9–10.

In finding no interest in preventing breaches of the peace, the Court noted that no disturbance actually occurred or threatened to occur because of Johnson's burning of the flag. Id. at 10. The Court also found no merit in Texas' claim that it need only demonstrate "the potential for breach of the peace". Id. at 11. For the Court to accept this point would have required it to eviscerate its holding in *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969), which it declined to do. In addition, the opinion pointed out, Texas has a statute specifically prohibiting breaches of the peace, which negated the need for Texas to punish flag desecration in order keep to the peace. Id. at 12.

The majority found the second governmental interest, that of preserving the flag as a symbol of national unity, to be directly related to expression in the context of the activity. *Johnson, supra,* at 12. The Texas law did not cover all burnings of flags. Instead it protected the flag only against abuse that would "seriously offend one

or more persons * * *'" Texas Penal Code Ann. Sec. 42.09(b) (1989). Thus, Johnson's violation of the law depended upon the "likely communicative impact of his expressive conduct." *Johnson, supra,* at 14. As a result, the statute was subject to exacting scrutiny. Id. at 14–15.

The Court held that the Texas statute could not withstand this level of scrutiny. The Court held that a bedrock principle of the First Amendment is that the government cannot prohibit the expression of an idea simply because society finds that idea offensive or disagreeable. Nor can a State limit the use of designated symbols to communicate only certain messages. Id. at 18–19. In sum, the Court held, the State's interest in preserving the flag as a symbol of national unity was insufficient to justify Johnson's criminal conviction for engaging in political expression.

EARLIER SUPREME COURT FLAG CASES

Texas v. *Johnson* was not the first occasion on which the Supreme Court has overturned a flag desecration or misuse conviction on constitutional grounds. In the past twenty years, the Court has reviewed three other such cases, and in all three found that convictions under flag desecration or misuse statutes were unconstitutional.

In *Spence* v. *Washington,* 418 U.S. 405 (1974), the Supreme Court overturned appellant's conviction for displaying outside his window an upside down United States flag, to which he had affixed a peace sign made of removable tape. The appellant testified that his action was intended to protest the invasion of Cambodia and the killings of students at Kent State University, events that occurred a few days before his arrest.

Spence was charged under the State of Washington's "improper use" statute, which barred the display of a United States flag with words or figures affixed to or superimposed on it. The Supreme Court, in holding the statute unconstitutional as applied to Spence, found that his activity was "sufficiently imbued with elements of communication," id. at 409, to warrant consideration of First Amendment protection. The Court particularly stressed the factual context of Spence's activity: it involved only his private property; the circumstances made his message "direct, likely to be understood, and within the contours of the First Amendment"; his form of expression was not disruptive, but relatively "gentle and restrained"; and he did not "permanently disfigure the flag or destroy it." Id. at 415. The Court concluded that "no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts." Id.

Earlier during the same term, the Court decided *Smith* v. *Goguen,* 415 U.S. 566 (1974). Goguen was convicted under a Massachusetts statute for wearing a flag patch sewn to the seat of his trousers. In affirming the lower court's grant of habeas corpus relief, the Supreme Court held that the statute, which made it a crime to "publicly * * * treat contemptuously the flag of the United States," was held void for vagueness. The Court did not reach arguments of overbreadth or other First Amendment issues. Justice Powell's majority opinion reasoned that absent any prior

narrowing interpretations of the "treats contemptuously" phrase, and given the "widely varying attitudes and tastes for displaying" the flag, id. at 574, the statute did not meet the notice requirements of the due process clause.

A case decided in 1969, *Street* v. *New York,* 394 U.S. 576, is factually more similar to *Johnson*. Appellant, upon learning of the shooting of civil rights leader James Meredith, set fire to his American flag outside his apartment. A short time later he told a police officer, "If they let that happen to Meredith, we don't need an American flag." He was convicted under a New York statute making it a crime "publically [to] mutilate, deface, defile, or defy, trample upon, or cast contempt upon [any American flag] either by words or act." The Court overturned his conviction on overbreadth grounds without considering his vagueness or freedom of expression arguments. "[U]nable to say with certainty that appellant's words were not an independent cause of his conviction," id. at 589, the Court concluded that the New York statute impermissibly included verbal expression, which is explicitly protected by the Constitution. The Court thus declined to reach the question of the constitutionality of statutes barring the act of flag burning alone.

SYMBOLIC SPEECH

Symbolic speech, or conduct symbolizing a specific message, has received constitutional protection for over half a century. In *Stromberg* v. *California,* 283 U.S. 359 (1931), the appellant was convicted under a statute making it illegal to display a red flag in opposition to organized government. The Supreme Court held that displaying a flag as a peaceful and legal means to express opposition to the government was a form of free speech, and was therefore protected by the First Amendment. The Supreme Court in 1966 held that a sit-in by a group of blacks protesting segregation was an exercise of speech. Justice Fortas wrote that the rights of freedom of speech and assembly are "not confined to verbal expression. They embrace appropriate types of action. . . ." *Brown* v. *Louisiana,* 383 U.S. 131, 142 (1966). The Court similarly held that the wearing of black armbands to protest the Vietnam War was "closely akin to 'pure speech' " and therefore entitled to the highest protection under the First Amendment. *Tinker* v. *Des Moines School District,* 393 U.S. 503, 506 (1969).

However, the Supreme Court has not always struck down government regulation of conduct whenever expressive content was involved. It has separated the regulation of "pure speech" from situations in which the government might have an interest in regulating the conduct apart from the suppression of speech. In *United States* v. *O'Brien,* 391 U.S. 367 (1968), a protester who burned his draft card was convicted under a federal statute prohibiting the knowing destruction, mutilation or alteration of a Selective Service registration certificate. In upholding the conviction, the Court rejected the argument that any conduct can be labelled speech whenever it has communicative intent, thus meriting First Amendment protection. Id. at 376. Instead, the Court articulated a test to be applied whenever "speech" and "non-speech" elements were involved in particular conduct. A government regulation would be upheld

only if "[1] it is within the constitutional power of the Government, [2] it furthers an important or substantial governmental interest, [3] the governmental interest is unrelated to the suppression of free expression, and [4] the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Id. at 377. The Court found that the prohibition involved furthered the governmental interest, unrelated to expression, of the smooth functioning of the draft, and it therefore upheld the conviction and the applicable regulation.

The following year, the Supreme Court reversed the conviction of an actor for the unauthorized use of an Army uniform during a play critical of the Vietnam War. *Schacht* v. *United States,* 398 U.S. 58 (1970). The voided provision contained an exception for the use of military uniforms in plays that did not "tend to discredit the military." The Court held that such a rule could be held constitutional if it applied to *all* plays, independent of their specific message. Id. at 63.

The Supreme Court's symbolic speech cases therefore stand for the proposition that the government can regulate conduct with speech elements, as long as that regulation is "content-neutral," i.e., the government's purpose was not suppression of free expression.

PROPOSED RESPONSE TO TEXAS V. JOHNSON

At the Subcommittee's five hearings, witnesses represented three basic positions: Congress should (1) do nothing; (2) amend the Constitution; or (3) amend the current federal flag desecration statute to conform to the *Texas* v. *Johnson* opinion.

Several witnesses, who included members of the House and Senate, constitutional law scholars and decorated war veterans, argued that the Supreme Court decision was correctly decided and should not be disturbed. They argued that flag burning is a form of symbolic speech protected by the First Amendment, and that flag burning poses no threat to a free nation.

Proponents of the constitutional amendment also agreed that flag burning is a form of symbolic speech protected by the First Amendment. They argued, however, that flag burning should be illegal and that only a constitutional amendment could overcome the Supreme Court's ruling in *Texas* v. *Johnson.*

Finally, a number of witnesses testified that a constitutional amendment was not necessary, that a statute punishing flag burning and other physical assaults on the flag could be drafted in a way that would be consistent with *Texas* v. *Johnson.*

THE FLAG PROTECTION ACT OF 1989

Texas v. *Johnson* is the fourth Supreme Court decision since 1969 holding that a flag desecration or misuse statute, as drafted or as applied, infringed on expression. In each case, the Court held that a conviction under such a statute was unconstitutional.

In all of these cases, the Court indicated that it would look differently on a content-neutral statute that would protect the physical integrity of the flag in all circumstances, one that focused solely on conduct and did not turn on the message being conveyed by the

flag burner. The purpose of the Flag Protection Act is to conform federal law to these decisions by removing from the existing federal statute, 18 U.S.C. §700,[2] any language that is content-specific or that focuses on communication. The purpose of the bill is to protect the physical integrity of American flags in all circumstances, regardless of the motive or political message of any flag burner.

The Supreme Court's decision in *Texas* v. *Johnson* was a very specific one. The Court held that it is impermissible for a statute to target those people who desecrate a flag in a manner that would give offense to others. The Court's central concern was that the State of Texas had focused on what Johnson intended to express and how he wanted people to feel upon seeing him do it. Because the prosecution targeted the message being communicated by Johnson, the free speech clause of the First Amendment came into play.

Nothing in *Texas* v. *Johnson,* or in any other majority opinion of the Supreme Court, renders unconstitutional universal, content-neutral protection for the flag. To the contrary, the Court has indicated that a statute aimed solely at protecting the physical integrity of the flag would pass constitutional muster.

In reaching its conclusion in *Johnson* that the Texas law was aimed at suppressing expression, the Supreme Court stated, "The Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others." *Johnson, supra,* at 13. As a footnote to this sentence, the Court favorably cited Justice Blackmun's dissenting opinion in *Smith* v. *Goguen,* 415 U.S. (1974), in which Justice Blackmun voted to uphold a conviction for flag desecration because the State Supreme Court, interpreting the statute, "limited the scope of the statute to protecting the physical integrity of the flag." Id. at 591. Justice Blackmun joined the majority in *Texas* v. *Johnson.*

Similarly, in *Spence* v. *Washington,* 418 U.S. 405 (1974), another case in which the Court reversed a flag misuse conviction, the Court noted that "no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts." Id. at 415.

In response to these cases, the bill amends current federal law to delete the language "casts contempt upon" and the words "publicly" and "defiling." Thus, any conduct resulting in physical harm or damage to the flag, regardless of the actor's intent, is prohibited.

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[2] 18 U.S.C. §700 provides:

Desecration of the Flag of the United States: penalties.

(a) Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

(b) The term "Flag of the United States" as used in this section, shall include any flag, standard, colors, ensign, or any picture or representation of either, or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, colors, or ensign of the United States of America, or a picture or a representation of either, upon which shall be shown the colors, the stars and the stipes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag, standards, colors, or ensign of the United States of America.

(c) Nothing in this section shall be construed as indicating an intent on the part of Congress to deprive any State, territory, possession, or the Commonwealth of Puerto Rico of jurisdiction over any offense over which it would have jurisdiction in the absence of this section.

With the exception of disposal of worn or soiled flags, the amended statute will prohibit all burnings of American flags.

The flag is worthy of protection not because it represents any one idea, and the bill does not seek to protect the flag as the embodiment of any one idea. As the testimony of the witnesses demonstrated, the flag represents different things to different people.

H.R. 2978 does not elevate any one view of what the flag represents. Rather, it recognizes the diverse and deeply held feelings of the vast majority of citizens for the flag, and reflects the government's power to honor those sentiments through the protection of a venerated object in the same manner that protection is afforded to gravesites or historic buildings.

DISPOSAL

The bill includes a specific exception for disposal of worn or soiled flags. When a flag, through normal usage and the passage of time, has become worn or soiled, so that it is no longer a fitting emblem for display, the governmental interest in protecting its physical integrity no longer applies. Such a flag may be disposed of, by burning or other means, and the revised federal statute would explicitly so provide.

This subsection was added in response to concerns raised during the hearings that a content-neutral statute would criminalize the disposal of flags that are worn and no longer fit for display. Responding to the apprehension that the statute would "make criminals out of every member of a veterans' post that has a ceremonial burning of a worn-out flag on Memorial Day * * *," Senator Biden pointed out that such tattered flags "have been already destroyed" and are no longer in a condition to serve their purpose.[3]

Other witnesses also expressed concern regarding a possible overbreadth problem. Paul Kamenar, Executive Legal Director of the Washington Legal Foundation, said the bill "would have the odd result of prosecuting veterans who destroy the flag, whom we really don't want to prosecute." [4] Charles Cooper, former Assistant Attorney General for the Office of Legal Counsel, feared that "Senator Biden's neutral proposal would also reach and punish the conduct of the nameless man in Dallas who gathered up Johnson's charred flag and buried it in his own backyard." [5] William P. Barr, Assistant Attorney General for the Office of Legal Counsel, objected to the adoption of "an absurdly broad statute that no one wants," and viewed as "one of the fundamental flaws of Senator Biden's proposal" its conflict with 36 U.S.C. § 176(k), the federal law described the destruction by burning of flags no longer fit for display.[6]

Addressing this problem, Professor Walter E. Dellinger of Duke University Law School suggested that it should be made clear "that a flag which is torn, worn, frayed, is no longer a flag within the meaning of the statute . . . and of course can be disposed of." [7]

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[3] Hearings, July 13, 1989.
[4] Hearings, July 18, 1989.
[5] Id.
[6] Hearings, July 19, 1989.
[7] Hearings, July 18, 1989.

Professor Laurence Tribe of Harvard Law School further expressed his belief that "the purpose of this law—to protect the flag and what it represents from needless and wanton destruction—are quite consistent with a narrow exception for orderly disposal." [8]

To clarify this point, Representative Hughes, Chairman of the House Judiciary Subcommittee of Crime, introduced H.R. 2855, a version of the bill which explicitly includes a provision excepting from punishment "any conduct consisting of the disposal of the flag in accordance with" the federal flag code, 36 U.S.C. § 171 et seq. Mr. Hughes testified that he felt this section to be "essential." [9] H.R. 2978 includes a modified version of the provision in H.R. 2855, allowing the disposal or worn or soiled flags.

The protections the bill accords to flags through criminal sanction are distinct from the advisory or hortatory provisions of the federal flag code. The latter prescribes rules for proper behavior during performance of the national anthem or recitation of the Pledge of Allegiance, and for the display and use of the flag. These rules have never carried criminal sanctions. They remain unaffected by the bill. The bill addresses a distinct set of concerns involving physical destruction of the flag.

The disposal provision is a logical and necessary corollary to a statute that protects the physical integrity of all American flags. As flags are ordinarily made of materials that wear out with prolonged, proper use, a strict prohibition against their destruction would require the maintenance of all flags in perpetuity. This is not the intent of the Committee.

EXPEDITED REVIEW

In order to achieve prompt Supreme Court review of the constitutionality of the revised federal flag protection law, the bill includes a provision for expedited review. The provision is consistent with existing Supreme Court procedures for certification of questions on appeal. Supreme Court Rules 24 and 25; 28 U.S.C. § 1254. The expedited review procedure is similar to the provisions which was included in 1985 as section 274 of Public Law 99-177 (the Gramm-Rudman-Hollings law).

This section responds to the reservations expressed by a number of witnesses over the delay and uncertainty that might result from extended litigation to determine the constitutionality of the statute. Former Judge Robert Bork testified that he was:

> * * * not even sure that the Supreme Court would pass upon the constitutionality of such a statute. Lower courts applying the *Johnson* decision will declare it unconstitutional and the Supreme Court need not even grant a writ of certiorari to face the issue so that after several years of litigation, we would certainly be right back where we are today * * *.[10]

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[8] Id.
[9] Hearings, July 20, 1989.
[10] Hearings, July 19, 1989.

James Magill, Director of the National Legislative Service of the Veterans of Foreign Wars, stressed the need for timely action to protect the flag:

> For the Congress to address this issue through legislation would only result in the Supreme Court upholding its decision . . . Then, after a lengthy time period, would the realization be made that a constitutional amendment is the only effective solution.[11]

The flag protection law as amended by Section 3 eliminates the possibility of a prolonged period of litigation during which the flag would be unprotected. Expedited review insures not only that any question regarding the law's constitutionality is resolved quickly, but also that such review is conducted definitively by the Supreme Court.

DEFINITION

The current federal flag protection statute includes a definition of "flag" so broad it covers many things that most people would not think of as a flag. For example, under the current definition, a disposable paper cup or napkin with a flag printed on it is itself a flag. The bill corrects this problem, and the potential for overbreadth, by making it clear that a flag does not include depictions such as photographs of flags on magazine covers or products with flags printed on them. The bill further limits the definition of flag by limiting it to those things that are commonly displayed as flags, excluding, for example, a cake in the shape of a flag.[12]

The problem was originally raised in the context of discussion of the meaning of the term "desecration" as used in the proposed constitutional amendment. Several examples of situations which may or may not be considered desecration were raised, including flag designs on clothing, artistic renditions of flags in publications, and commercial and political uses of the flag.[13] For example, Professor Dellinger pointed out that "Many state statutes provide that . . . a flag includes any replica of a flag, whether by picture, by cloth, whether two-dimensional or three-dimensional."[14] Representative Ackerman testified that "different people have different levels of outrage," so that "a pinwheel with the American flag just blowing in the wind is offensive to some people," as is the use of napkins or paper plates or socks with flag designs.[15]

However, because such decorative representations of flags are not actual flags in that they are not commonly displayed as flags and have other uses, the government has no interest in protecting their physical integrity. The revised federal flag protection statute

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[11] Hearings, July 20, 1989.

[12] Each of these examples was raised during the hearings as a potential violation of the proposed statute. Hearings, July 18, 1989, Paul Kamenar (newspapers); id., Charles Cooper (cake); hearings, July 19, 1989, William Barr (newspapers and paper cups); id., Charles Fried (paper cup).

[13] Hearings, July 13, 1989; remarks of Rep. Patricia Schroeder. Mrs. Schroeder voiced her concern that the states "could decide that clothing or artistic symbols could be illegal in their state and another state could decide it's okay * * * you may have to have a dress code as you go across the state lines," and one might not "be able to mail magazines over state lines."

[14] Hearings, July 18, 1989.

[15] Hearings, July 20, 1989.

thus avoids the definitional problems of the constitutional amendment, as well as any infirmities of vagueness or overbreadth.

Section-by-Section Analysis

Section 1 provides that the short title of this Act will be the Flag Protection Act of 1989.

Section 2(a) amends 18 U.S.C. 700(a) to provide that it shall be a crime to knowingly mutilate, deface, burn or trample upon any flag of the United States, and to specify that the subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.

Section 2(b) amends the definition of flag to exclude pictures and representations of flags and to make it clear that section 700 applies only to United States flags in a form that is commonly displayed.

Section 3 provides a procedure for expedited Supreme Court review of the constitutionality of the new section 700.

Oversight

Pursuant to clause 2(l)(3) of rule XI of the Rules of the House of Representatives, no oversight findings have been presented to the Committee by the Committee on Government Operations. The findings of the Committee on the Judiciary are incorporated throughout this report.

Budgetary Information

Clause 2(l)(4)(B) of rule XI of the Rules of the House of Representatives is inapplicable because the instant legislation does not provide new budgetary authority.

Inflationary Impact

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee believes the legislation will have no significant inflationary impact on prices and costs in the operation of the national economy.

Estimate of Cost

Pursuant to clause 7 of rule XIII of the Rules of the House of Representatives, the Committee states that it concurs with the estimate submitted by the Congressional Budget Office as set forth below.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the following estimate was prepared by the Congressional Budget Office and submitted to the Committee.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 1, 1989.

Hon. JACK BROOKS,
Chairman, Committee on the Judiciary, House of Representatives, Washington, DC.

The Congressional Budget Office has reviewed H.R. 2978, the Flag Protection Act of 1989, as ordered reported by the House Committee on the Judiciary, July 27, 1989.

H.R. 2978 would amend section 700 of title 18, United States Code, to change the provisions related to desecration of the United States flag. CBO estimates that enactment of this bill would result in no cost to the federal government or to state or local governments.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Michael Sieverts, who can be reached at 226–2860.

Sincerely,

ROBERT D. REISCHAUER,
Director.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, H.R. 2978 as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed in shown in roman):

SECTION 700 OF TITLE 18, UNITED STATES CODE

§ 700. Desecration of the flag of the United States; penalties

[(a) Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than $1,000 or imprisoned for not more than one year, or both.]

(a)(1) Whoever knowingly mutilates, defaces, burns, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.

(2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.

[(b) The term "flag of the United States" as used in this section, shall include any flag, standard colors, ensign, or any picture or representation of either, or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, color, or ensign of the United States of America, or a picture or a representation of either, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or of any part or parts of either, by which the average persons seeing the same without deliberation may believe the same to represent the flag, standards, colors, or ensign of the United States of America.]

(b) As used in this section, the term "flag of the United States" means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.

* * * * * * *

(d)(1) If the question of the constitutionality of this section, under the first article of amendment to the Constitution of the United States, is properly presented in any case before a United States district court, that court shall, if the Supreme Court of the United States has not previously ruled on that question, immediately certify that question to the Supreme Court.

(2) The Supreme Court shall, if it has not previously ruled on that question, accept jurisdiction over the certified question and advance on the docket and expedite to the greatest extent possible the disposition of that question. The Supreme Court may, with respect to such question, give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(3) The Clerk of the Supreme Court shall promptly notify the Clerk of the House of Representatives and the Secretary of the Senate of the receipt of such certification, and each House of Congress shall have the right to intervene in the case for the purpose of defending the constitutionality of this section.

ADDITIONAL VIEWS OF MESSRS. F. JAMES SENSENBRENNER, JR., CARLOS J. MOORHEAD, BILL McCOLLUM, GEORGE W. GEKAS, WILLIAM E. DANNEMEYER, HOWARD COBLE, D. FRENCH SLAUGHTER, JR., LAMAR SMITH, LARKIN I. SMITH, AND CRAIG T. JAMES

INTRODUCTION

Although we have voted in favor of H.R. 2978, to show support for protecting the flag, we firmly believe a statute to overturn a constitutional ruling of the Supreme Court is wrong and sets a very dangerous precedent for future Congresses. The method provided by the Constitution to resolve this type of dilemma is the amendment process, and the statute should not be considered a substitute for a constitutional amendment.

There were 38 constitutional amendments and three statutory proposals referred to the Subcommittee on Civil and Constitutional Rights; yet the full Committee considered and ordered reported only a statutory proposal—H.R. 2978. Additionally, the bill that was marked up was not introduced until after the hearings were completed in the Subcommittee.

The reason a statute purporting to protect the flag would be unconstitutional is evident from even a cursory reading of the Court's opinion in *Texas* v. *Johnson,* 57 U.S.L.W. 4770 (June 21, 1989). In addition, many noted scholars agree that the statutory approach is wholly inappropriate. President Bush has proposed a constitutional amendment as the only adequate approach to truly protect the flag from desecration. Assistant Attorney General William P. Barr, speaking on behalf of the President and Attorney General Thornburgh, stressed that any statute drafted to overturn the decision would be struck down as unconstitutional. Mr. Charles J. Cooper, former Assistant Attorney General and predecessor to William Barr, also agreed that no statute could address the problem of *Texas* v. *Johnson.*

Charles Fried, former Solicitor General under President Reagan, although of the view that the *Texas* v. *Johnson* decision was right, believed that any statute would be ruled unconstitutional because of its attempt to punish acts of expression and that by attempting to overturn the decision with a statute would "be an undignified and unworthy way for Congress to play games with the Supreme Court decision". Judge Robert H. Bork, noted constitutional scholar, also agreed that no statute could undo *Texas* v. *Johnson* but would only "produce delay" by throwing the issue back before the courts. Floyd Abrams and Walter Burns, two additional constitutional scholars who do not favor a constitutional amendment, agree that legislation will not be effective in overturning the decision.

ANALYSIS OF SUPREME COURT DECISION

The threshold question addressed by the Court was whether Johnson's burning of the flag constituted expressive conduct protected by the First Amendment. Noting that the Flag is "pregnant with expressive content," the court readily determined that Johnson's burning of the Flag was protected by the First Amendment.

In his testimony before the Subcommittee, William Barr, Assistant Attorney General for the Office of Legal Counsel, explained the relevance of this holding. When the particular conduct is determined to be protected by the First Amendment, and there is a government rule prohibiting that kind of conduct, a collision occurs between the two interests. The Court has developed two different standards to weigh these competing interests. First, it considers the governmental interest with exacting scrutiny, or Level One. Here the government needs a compelling interest to override the First Amendment rights of the person who is engaged in the conduct. It is rare for the governmental interest to prevail at Level One scrutiny. Second, it considers the governmental interest with a more lenient standard, commonly known as the *O'Brien* standard, or Level Two. Here the government only needs an important interest to override the First Amendment protection. If the government can get its case to be judged under the *O'Brien* standard, it is much easier to prevail.

To determine the appropriate standard of review, the Court will look behind the actual words and determine the reason for the statute. As the Department of Justice testified, unless the government's reasons for the statute are "unconnected" to expression, the statute will always be subject to exacting scrutiny, which is nearly always fatal.

The State of Texas asserted two interests in support of its prohibition on flag burning: preventing breaches of the peace, and preserving the flag as a symbol of nationhood and national unity. The State's interest in preventing breaches of the peace was not implicated on the record. Significantly, however, the Court rule that the government may never *assume* that flag burning will cause a breach of the peace. Moreover, said the Court, burning the flag as a "generalized expression of dissatisfaction with the policies of the Federal Government" is not the equivalent of "fighting words" that could cause a breach of the peace, because "[n]o reasonable onlooker" would regard it as a "direct personal insult or an invitation to exchange fisticuffs." (Id., at 4772).

Regarding the State's asserted interest in preserving the Flag as a symbol of our nationhood and national unity, it found this interest to be directly related to the suppression of expression: "[T]he Government's interest in preserving the flag's special symbolic value 'is directly related to expression in the context of activity' " intended to express a message. Because the Government's interest in preventing flag burning was related to expression, the State's interest was subjected to the "most exacting scrutiny." Id. at 4774.

The Court held that Texas' interest in preserving the flag as a symbol of our nationhood and national unity could never satisfy exacting scrutiny and thus could not justify a prohibition on flag burning. Governmental protection of the Flag because of its sym-

bolic importance to the Nation, the Court reasoned, would be tantamount to a governmental directive that the "symbol be used to express only one view of that symbol or its referents." Id. at 4775. The Government, said the Court, may not "foster its own view of the flag by prohibiting expressive conduct relating to it." Any attempt to preserve the flag as a symbol offends the "bedrock principle" that "the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Id. at 4774. Finally, the Court explicitly refused to accord the flag any special constitutional significance, finding "no indication—either in the text of the Constitution or in [its] cases interpreting it—that a separate juridical category exists for the American flag alone." Id. at 4775. We think it is plain under this reasoning that any statute prohibiting desecration of the flag would be unconstitutional.

THE STATUTORY APPROACH

Those proposing a statutory response to the Court's decision suggest that a statute which prohibits all flag destruction, whether in public or private, and whether done with contempt or not, would be upheld. This argument is demonstrably wrong.[1] It assumes that a statute neutral as to the particular viewpoint expressed would be "unrelated to expression." It would not be.[2] The Government's reasons for passing such a statute would be precisely the same reasons it had for previously prohibiting contemptuous desecration: protection of the symbolic value of the flag. This legislative history will point directly to that reason. Judge Bork noted in his testimony before the Subcommittee: "[T]his conversation itself dooms any possibility of the constitutionality of such a statute."

The Supreme Court has now held in two successive cases, *Spence* v. *Washington,* 418 U.S. 406 (1974), and *Texas* v. *Johnson,* that it is the Government's reasons for the prohibition, not the scope of the prohibition, that determines the level of scrutiny. Because the Government's reason for protecting the Flag is necessarily related to expression, any prohibition will always be subjected to exacting scrutiny, and therefore would never prevail over an individual's First Amendment interest in expressive conduct. No flag protection statute would, or ever could, be justified by anything other than the Government's interest in protecting the symbolic value of the

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[1] In his testimony before the Subcommittee, Mr. Paul D. Kamenar, Executive Director of the Washington Legal Foundation, pointed out that even Professor Tribe, a strong advocate of a statute, earlier in his writings advocated that a statute could not be constitutionally drafted in a flag burning context to avoid exacting scrutiny. In his book, "American Constitutional Law," (1978), Professor Tribe gives several examples of what kinds of flag desecration statutes would be unconstitutional. Discussing a statute which would seem neutral on its face, Tribe concludes that since the "only possibly legitimate interest advanced by prohibiting destruction or mutilation of any flag is an interest that arises only when such conduct is perceived by others, and only when the conduct is interpreted in a certain way, such a statute would have to satisfy the strict scrutiny standards." As Mr. Kamenar notes, "we know already that the Court in *Texas* v. *Johnson* found those interests to be insufficient" [to outweigh the First Amendment rights of *Johnson*].

[2] Even Justice Kennedy, the swing vote in *Texas* v. *Johnson,* admitted that the problem with this case was not that there was a problem with the wording of the statute, but rather that the act itself was ultimately protected by the First Amendment: "We cannot here ask another branch to share responsibility, as when the argument is made that a statute is flawed or incomplete. For we are presented with a clear and simple statute to be judged against a pure command of the Constitution. The outcome can be laid at no door but ours." Id. at 4776.

Flag. Any claim to the contrary would plainly be pretext and would be recognized as such by any court.

THE CONSTITUTION ESTABLISHES A PROCEDURE FOR ITS OWN AMENDMENT

The Constitution explicitly provides, under Article V, for amendments to be proposed by two-thirds of the Congress and to become valid upon ratification by the legislatures of three-fourths of the several states. Because of this difficult and lengthy process, rash or dangerous action should not be feared.

Opponents of the constitutional amendment argue that we should not tamper with the sacred Bill of Rights and that this sets a dangerous precedent for frequent resort to the amendment process for the curtailment of rights of the unpopular. However, a statutory response to *Texas* v. *Johnson* is a far more dangerous precedent. This is an efforts to overturn a constitutional ruling of the Court through a normal legislative act, rather than the process which is explicitly stated in the Constitution itself. In *Marbury* v. *Madison*, in 1803, Chief Justice John Marshall wrote: "It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it; or that the legislature may alter the Constitution by an ordinary act." 1 Cranch 176. Judge Robert H. Bork, testifying before the Subcommittee, made the following point which reiterates the above principle: "No statute can be drawn that can cure the problem created by *Texas* v. *Johnson*. Indeed, if that were possible, it seems to me an even more dangerous, a far more dangerous course than amending the Constitution because it would mean that Congress can overturn Supreme Court constitutional decisions by a straight majority vote and I don't think that is what our system of government imagines and it is certainly not what *Marbury* v. *Madison*, decided by Chief Justice John Marshall, meant." (Pg. 48 of Transcript.)

If the desire is to overturn *Texas* v. *Johnson* as it surely must be, the First Amendment right of free speech, as defined by the five Justices in *Texas*, must be altered. The only method for altering any right in the Constitution is to utilize the amendment process. A constitutional amendment is the far more rational response to this dilemma.

Congress and the States would have the power to prohibit the specific conduct that everyone finds objectionable (and only that conduct) if the Constitution were amended. Congress would not have to adopt an approach, as it is now considering, in which thousands of people are made into criminals for the sake of reaching persons engaged in truly contemptuous conduct. In short, with an amendment, Congress and the States could do what they did before June 21, 1989: define and prohibit the specific conduct to which they truly object.

We believe, then, it is crucial to allow a vote onthe constitutional amendment. One amendment, the one introduced by House Repub-

lic Leader Robert Michel and Democratic Chairman of the Armed Services Committee, Sonny Montgomery and endorsed by President Bush, reads: "The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States." The first, and perhaps most important, point to be made is that the amendment does not itself does not itself prohibit flag desecration. It merely empowers Congress and the States to prohibit legislatively the physical desecration of the flag. It also establishes the boundaries within which Congress and the State legislatures may legislate.

Within the framework of the amendment, Congress and the States would have wide latitude to prohibit desecration of the flag. They would be required to define "flag" and "physical desecration," as well as determine whether to make intent a necessary element of a flag desecration offense.

We believe the phrase "physical desecration," too, would provide some latitude to Congress and the States, although the amendment would significantly channel the legislative decision. For example, Congress and the States could not punish any nonphysical desecration of the flag. For there to be "physical desecration," there must be contact of some sort with the flag. Mere words or gestures, regardless of offensiveness, could not be prohibited. Similarly, normal or customary displays of the flag could not be prohibited, regardless of the particular surroundings. A proper display, without more, could never constitute an act of physical desecration. We believe the acts specified in the joint resolution—burning, mutilating, defacing, defiling or trampling on the flag, or displaying the flag in a contemptuous manner—represent the type of physically abusive acts that may be prohibited.

The third significant responsibility for the legislatures would be to determine whether a person must have intended his act to be contemptuous. In most situations, Congress and the States would likely continue to require such intent, as they did before the Court's decision in *Texas* v. *Johnson*. Nevertheless, the legislatures would be free to impose an intent requirement, or not, as they deemed appropriate. Offering legislatures the option of prohibiting only intentionally contemptuous, physical desecration represents an important advantage of a constitutional amendment. The statutory options being considered take away this significant legislative flexibility in an ultimately futile efforts to circumvent the clear command of the Supreme Court.

CONCLUSION

There is no doubt a statute will simply not be effective in fulfilling the purpose of the legislation, i.e., protecting the flag from desecration. Unfortunately, this will not become apparent until the flag is once again desecrated and the Supreme Court once again upholds the flag protestor's right to burn the flag. It is a shame that we must endure this charade in order to ultimately reach the

right result. If we truly desire the flag to be protected from such disrespect, we must be allowed a vote on the constitutional amendment now. Otherwise we are simply endorsing the *Texas* v. *Johnson* decision.

F. JAMES SENSENBRENNER, Jr.
C.J. MOORHEAD.
BILL MCCOLLUM.
GEORGE W. GEKAS.
BILL DANNEMEYER.
HOWARD COBLE.
D. FRENCH SLAUGHTER, Jr.
LAMAR SMITH.
LARKIN I. SMITH.
CRAIG JAMES.

SUPPLEMENTAL VIEWS OF MESSRS. F. JAMES SENSENBRENNER, JR., CARLOS J. MOORHEAD, BILL McCOLLUM, WILLIAM E. DANNEMEYER, HOWARD COBLE, D. FRENCH SLAUGHTER, JR., LARKIN SMITH, AND CRAIG T. JAMES

There were 38 bills referred to the Subcommittee on Civil and Constitutional Rights proposing a constitutional amendment and only three suggesting a statute to overturn the *Texas* v. *Johnson* Supreme Court decision. The Subcommittee held four days of hearings (July 13, 18, 19, and 20, 1989) at which a majority of those who testified agreed that no statute could be drafted which would be sufficient to overturn *Texas* v. *Johnson*. Ignoring these warnings, Chairman Brooks claimed in the markup of H.R. 2978 that "on the basis of that record, it is my firm belief that a statute protecting the flag from physical harm can be drafted in a way that is consistent with the Court's holding in that case."

Our vote in favor of H.R. 2978 was simply a vote to protect the flag. By supporting the Chairman's effort to push what is undoubtedly an unconstitutional attempt to overturn *Texas* v. *Johnson* by statute, we look forward to soon having an opportunity to vote on a constitutional amendment which will prevent future desecration of the flag. Additionally, we look forward to debating the bill on the Floor under an open rule in order to attempt to minimize the negative results this statute could have. With only two days to draft amendments to the bill,[1] there is much more that needs to be discussed.

We are, however, compelled to point out a few of the absurdities which are inevitable in an effort to create a content-neutral statute which would avoid the holdings of *Texas* v. *Johnson*.

The current flag desecration law (18 U.S.C. 700) which has now been effectively rendered unconstitutional reads:

> Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

H.R. 2978 makes the following changes: (1) removes the words "casts contempt upon"; "publicly"; and "defiling"; and (2) adds "This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled." Additionally, the bill limits the definition of "flag" to merely: "any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed," and provides for an expedited review of the constitutionality of this statute to the Supreme Court.

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[1] H.R. 2978 was introduced by Chairman Brooks (D–TX) and Mr. Edwards (D–CA) on July 24, 1989, after the hearings were completed and two days before the markup.

As noted in the supplemental testimony of the Department of Justice, dated July 31, 1989, specifically addressing H.R. 2978, there are several serious defects in the bill. By removing the words "cast contempt upon", "publicly" and "defiling", the current bill has been gutted of its whole purpose. All express reference to "desecrate" has been removed. To be truly neutral as to viewpoint, the statute has to prohibit even patriotic acts. For example, a movie producer who made a glorious movie about this nation that included scenes from military battles in which the flag was hit by musket fire would be subject to criminal prosecution. A mother, who mourns the loss of her son in battle and pins on the flag the medals he had earned, would also be subject to criminal prosecution.

The exception from prosecution for any conduct consisting of the disposal of a soiled and worn flag allows any flag protestor to, first, dirty the flag in whatever manner it sees fit and, then, burn or mutilate the flag in protest against the United States. This "dirty flag defense" is an absolute defense for any political protestor who feels the need to torch "Old Glory". In an attempt to protect those who reverently dispose of the flag, such as veterans groups, the unfortunate result is that we are, in fact, protecting those acts which we most particularly want to prohibit, i.e., burning or destroying the flag in disrespect.

Narrowing the definition of the flag to forms commonly displayed, this bill would not prohibit such contemptuous conduct as painting a wall-sized mural or billboard of the flag with a swastika superimposed on it. Such conduct certainly impairs the symbolic value of the flag as much as destruction of the flag itself. Finally, the addition of the expedited review process suggests that someone once again desecrate a flag so we can once again ask the Supreme Court whether it's acceptable to burn the flag in protest, just to hear the Supreme Court say it has already answered the question. To encourage the same activity we seek to outlaw is indeed an absurd result. It is far better to undertake a procedure we are confident will succeed than to attempt to place a bandaid on something when amputation is the answer. As Columnist Paul Greenberg notes in the Washington Times, July 27, 1989, those who attempt to correct the problem by statute are engaging in the legal equivalent of "inventing perpetual motion."

Why are we so reluctant to amend the Constitution to demand that flag desecration be prohibited? Is it too much to ask that those who consider themselves Americans be required to have respect for the flag? In this day and age, when it seems that perversion is accepted and morality a taboo religion, perhaps this small mandate for freedom is not asking too much! Chief Justice Rehnquist, in his dissent in *Texas* v. *Johnson* stated: "Surely, one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people—whether it be murder, embezzlement, polluting, or flag burning."

These problems highlight the need for the passage of a constitutional amendment to avoid the unintended consequences of such a

generalized statute. We urge the Committee to work on and report out a constitutional amendment soon after the August recess, and to allow H.R. 2978 to be considered under and open rule to allow efforts to minimize its negative impact.

F. JAMES SENSENBRENNER, Jr.
C.J. MOORHEAD.
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DISSENTING VIEWS OF CONGRESSMAN CHUCK DOUGLAS BEFORE JUDICIARY COMMITTEE CONCERNING H.R. 2978

During five days of testimony we have heard a great deal concerning how we should react to the recent Supreme Court case of *Texas* v. *Johnson*. There, the court held that when someone burns the flag for expressive purposes, the conduct is protected by our Constitution's First Amendment.

The decision held that the government's reason for protecting the flag, to preserve it as a symbol of national unity, is inherently and necessarily related to expression. Further, the court held that the government's interest in protecting the flag as a symbol of our national unity can never be sufficient to overcome an individual's First Amendment interest in burning the flag for communicative purposes.

According to the Court, a statute could not pass constitutional muster if it assumed that flag burning would in all cases cause a breach of the peace. In light of this reasoning, it would be difficult to imagine a reason which the Court would consider sufficient to justify abrogation of First Amendment rights. Short of a very narrowly drawn countervailing constitutional amendment, a statute just does not do the job.

The argument that a "content-neutral" statute would be sufficient has already been answered in the Supreme Court case of *Spence* v. *Washington*.

In *Spence* the neutral statute before it:

> [Did] not depend upon whether the flag is used for communicative or non-communicative purposes; upon whether a particular message is deemed commercial or political; upon whether the use of the flag is respectful or contemptuous; upon whether any particular segment of the state's citizenry might applaud or oppose the intended message.

Spence, 418 U.S. at 422–23 (1974). (Rehnquist, J. Dissenting).

Nevertheless it was unconstitutional as applied to a person engaged in communicative conduct. The court explained:

> [Even] [i]f the government's interest in preserving the value of the flag as a symbol of our nation] is valid, we note that it is directly related to expression in the context of activity like that undertaken by appellant.

Id. at 414 n. 8.

Justice Brennan, the author of the court's opinion in *Texas* v. *Johnson*, in fact has previously written that:

> The only basis for a governmental interest (if any) in protecting the flag is precisely the fact that the flag has substantive meaning as a political symbol. Thus, assuming

> that there is a legitimate interest at stake, it can hardly be said to be one divorced from political expression.

Kime v. *United States,* 459 U.S. 949, 953 (1982) (Brennan, J., Dissenting).

The Supreme Court in *Texas* v. *Johnson* has now held that the government's interest in protecting the flag as a national symbol is, by definition, related to the suppression of free expression. Therefore, it simply could never be successfully maintained that such a statute was content-neutral. The statute cannot be made content-neutral merely because it prohibits private as well as public burning of the flag. The government's purpose in prohibiting a desecration is the same whether or not the statute extends to private conduct.

First Amendment rights are not absolute and without limitation. The courts have upheld many exceptions to the great sweep of the First Amendment. Thus, one may not express oneself in the following way: (1) inciting a riot; (2) criminal solicitation; (3) libel; (4) slander; (5) child pornography; and (6) perjury. To name just a few that immediately come to mind.

To add by amendment, what has been made necessary, only because of one vote on the Supreme Court, will not gut the First Amendment. If I thought otherwise, I would vigorously oppose it.

I cannot vote for H.R. 2978 because it is clearly a backdoor attempt to overrule a First Amendment decision by statute. Once we start down that road, any number of cases of constitutional dimensions could be so overrruled without following the amendment process. I hope the Supreme Court doesn't succumb to such an absurdity.

If I thought in good conscience that a statutory alternative would work, I would readily support it.

Unfortunately, even if we were to pass a statute similar to that proposed in H.R. 2978 we would need to repeal the first sentence of 36 U.S. code section 176 which says "No disrespect should be shown to the flag of the United States . . ."

Otherwise, we are in a position where "respect" is still part of the laws we are supposedly changing to be neutral. I also don't know what the statutory solution would do about 36 U.S. Code S. 176 (k) that says that the flag may be burned in a "dignified way" when it is no longer "a fitting emblem for display." H.R. 2978 permits open ended flag burning as long as the flag is "soiled." No dignity or respect is required.

These are just some of the problems that any statutory alternative would entail.

Next year, communist Gregory Lee Johnson can burn an American flag with dirt on it and get away with it. In fact, he can claim he was in full compliance with the Act of Congress! Unbelievable? That is exactly what will happen if Congress approves H.R. 2978.

This bill is, of course, misleading in its title because it claims to be "The Flag Protection Act of 1989." It is really only a masquerade for "The Flag Burner Protection Act of 1989." The statute allows a protestor to burn an American flag after he has defiled it as long as it is "soiled."

Thus, in addition to the famous San Francisco "twinkie" defense, we will soon have the "soiled flag" defense enshrined in federal law. The bill, in Section 1 says that whoever burns a flag of the United States will be fined or imprisoned for a year. On the other hand, subsection 2 says, "this subection 1 does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled." Because subsection 1 no longer contains the prohibition under current law against defiling the flag, the combination of the two sections is a flag burner's dream.

In other words, all you have to do is first defile a flag by soiling it; then when you burn it under subsection 2 during your protest, you are in full compliance with federal law. The desecrater merely has to say to the judge with a straight face, "Oh, I was just disposing of a soiled flag".

The loophole is big enough to drive a truck through. It is no longer required that flags be disposed of by veterans organizations. It is no longer required to have them disposed of in accordance with appropriate ceremony or rules under 36 U.S. code 170 et seq. H.R. 2978 would create an open-ended federal law to "dispose" of a flag any way you want, as long as it is "soiled."

To put a flag burner defense into federal law creates an absurd loophole that is worse than not changing the statutes at all. It does nothing to fix state laws, nor does it allow for enforcement by local police.

The answer is, of course, a constitutional amendment to give Congress and the states the authority to enact appropriate laws concerning flag desecration. Flag burning can't be stopped by giving flag burners a new defense under the law while at the same time claiming that the new law protects the flag.

For these reasons I voted "no."

CHUCK DOUGLAS.

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